IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1553

COUNTY OF LOS ANGELES, *et al.*,

Petitioners,

—v.—

VAN DAVIS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF SOUTHERN CALIFORNIA *AMICI CURIAE*

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Interest of the Amici*

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 200,000 members dedicated to defending the

* The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk of the Court pursuant to Rule 42(2) of the Rules of this Court.

fundamental civil rights and civil liberties of the people of the United States. The ACLU of Southern California is the ACLU's regional affiliate for Southern California.

Central among the fundamental rights and liberties guaranteed by our Constitution is the right not to be discriminated against on grounds of race or color. Because of the crucial importance of this long neglected and frequently subverted right in a free society, the ACLU, in a variety of cases before this Court and before numerous other tribunals, has defended the rights of those who have been discriminated against.

In such cases, the ACLU has consistently argued that Congress is empowered to enact broad legislation outlawing all forms of racial discrimination, whether racially motivated or not; that persons discriminated against should not be required to bear onerous burdens in proving scienter where it serves no justifiable purpose and where such a requirement merely facilitates and encourages retention of discriminatory practices which have no countervailing benefit whatsoever to an identified defendant or to society at large; and that affirmative remedial relief is constitutionally permissible if not equitably necessary to remedy the continuing

effects of past and present racial discrimination against minorities who continue to be denied the benefits of equality in a free society.

The issues in this case encompass each of these three conerns. Amici submit that Congress not only was empowered to but actually did enact legislation in the form of the Civil Rights Act of 1866 to prohibit all enumerated forms of racial discrimination regardless of whether that discrimination was motivated by an intent to discriminate. Amici also submit, in the event that this Court engrafts a scienter requirement which does not appear on the face of the statute and which is contrary to the legislative history of the 39th Congress, that plaintiffs in a §1981 case could be required to bear no more than a burden of producing evidence of deliberate disregard, and that plaintiffs here not only have met such a burden of production but also have satisfied a burden of persuasion despite the fact that such a burden is not theirs. Finally, Amici submit that, on the extensive evidence in the record before the trial court, the affirmative numerical hiring relief ordered by that court was constitutionally permissible as well as equitably required in order to remedy the pervasive effects of defendants' past discrimination against racial minorities.

INTRODUCTION AND SUMMARY OF ARGUMENT

The facts in this case pertaining to defendants' discriminatory employment practices for the most part are undisputed. "Despite a minority population of approximately 29.1% in Los Angeles County, only 3.3% of the firemen employed by the defendants at time of trial were black or Mexican-American." Davis v. County of Los Angeles, 556 F.2d 1334, 1337 (9th Cir. 1977). This result was accomplished through the use of unvalidated written tests which not only had a severely discriminatory impact, 556 F.2d at 1337, but also were known by defendants to have a discriminatory impact. (Pl.Ex.7,8,9; R.T.48-49)* This result also was accomplished, inter alia, through the use of a non job related 5'7" minimum height requirement which excluded 41% of the otherwise eligible Mexican-American applicants, 556 F.2d at 1341-1342, through the conduct of application programs designed to assist whites but not minorities to apply (R.T.91-113), through the temporary loss of the names of 300 minorities who wanted to apply (R.T.187-188), and through

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* The citations to the record below, which has been lodged with this Court, are as follows: "Pl.Ex." refers to plaintiffs' exhibits; "R.T." means the recorded transcript; "R." refers to other portions of the record below.

the maintenance of a discriminatory reputation in the minority community (R.T.52,134,194).

Defendants for the most part do not contest these facts. But they do argue that 42 U.S.C. §1981 should not be interpreted, as the 39th Congress intended, to prohibit all enumerated forms of racial discrimination; they appear to argue that §1981 should be engrafted with a scienter requirement so onerous that their knowing use of discriminatory practices could not be proven unlawful under §1981; and they contend that the trial court exceeded its broad equitable authority by imposing affirmative relief to remedy their extensive past discrimination against blacks and Mexican-Americans. Amici believe that defendants are wrong on all counts.

A. Defendants first misconstrue the breadth and intent of 42 U.S.C. §1981, a statute which never has been curtailed or given a mechanical reading by this Court but which instead has been accorded "a sweep as broad as its language." Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437 (1968); See also, McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976); Runyon v. McCrary, 427 U.S. 160 (1976); Johnson v. Railway Express Agency, Inc., 421 U.S.

454 (1975); Tillman v. Wheaton-Haven Recreational Association, 410 U.S. 431 (1973); Sullivan v. Little Hunting Park, 396 U.S. 229 (1969). Its language, on its face, embodies no scienter requirement. Engrafting one now would be entirely inconsistent with this Court's interpretation of Title VII which on its face appears to require proof of intent to discriminate but which has been construed not to require proof of such intent. Griggs v. Duke Power Co., 401 U.S. 424 (1971). Moreover, it would be directly contrary to the intentions of the 39th Congress which identified numerous badges and incidents of slavery and thought that it had enacted legislation prohibiting not just intentional discrimination but all enumerated forms of racial discrimination whatever their source or motivation.

B. If this Court erroneously writes a scienter clause into 42 U.S.C. §1981 (thereby relegating the considerable efforts of the 39th Congress to the position of historical worthlessness in view of the subsequent ratification of the Fourteenth Amendment and enactment of the Civil Rights Act of 1871), this Court would have to decide whether defendants nonetheless have violated §1981 based on plaintiffs' proof "that a discriminatory purpose has been a motivating factor" in defendants' challenged practices. Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265 (1977). Although the precise degree of necessary mental culpability was not defined in Arlington Heights or in Washington v. Davis, 426 U.S. 229 (1976), it does not follow that any degree of mental culpability needs to be proved to establish a violation of §1981 in the circumstances of the instant case. The primary purpose of a scienter requirement, to provide a barrier against the unfair imposition of retroactive legal sanctions, is not furthered where plaintiffs seek prospective equitable relief and especially where defendants were on clear notice that their employment practices raised serious issues of racial unfairness. A secondary purpose of scienter, to protect individuals from being over-deterred from performing legitimate functions by a fear of strict liability, similarly is not served where defendants engage in employment practices which perpetuate racial exclusion but which fail to improve the quality of their workforce. Although no discernible purpose thus could be found for imposing a scienter requirement on §1981 here, plaintiffs nevertheless have sustained any production burden on this issue. And, although a burden

of persuasion on this issue, or on the issue of intent in general, could not logically be allocated to plaintiffs, they also met any such persuasion burden.

C. The record of identified past discrimination practiced by defendants provides a more than sufficient base for the affirmative hiring order imposed by the district court to remedy the pervasive effects of defendants' racial discrimination. As stated by Mr. Justice Powell in Regents of the University of California v. Bakke, 57 L.Ed.2d 750 (1978), once findings of past discrimination have been judicially rendered, "the governmental interest in preferring members of the injured groups at the expense of others is substantial." 57 L.Ed.2d at 782 (Powell, J.). See also, the opinion of Mr. Justice Brennan writing for himself and for Justices White, Marshall and Blackmun, 57 L.Ed. 2d at 792-827 (Brennan, J.). In view of the positions taken by five members of this Court in Bakke, the affirmative hiring order here is constitutionally permissible and equitably necessary.

ARGUMENT

A. The 39th Congress, in Seeking to Remove the Badges and Incidents of Slavery from Freedmen, Did Not Impose a Requirement of Proof of Scienter upon Plaintiffs Challenging Racially Discriminatory Employment Practices Pursuant to 42 U.S.C. §1981.

In Washington v. Davis, 426 U.S. 229 (1976), and in Arlington Heights v. Metro Development Housing Corp., 429 U.S. 252 (1977), this Court ruled that some degree of scienter must be proven in equal protection actions brought pursuant to §1 of the Fourteenth Amendment. Whatever the wisdom of such a construction of Section 1 of the Fourteenth Amendment, it is undisputed that Congress possesses the power to enact remedial legislation, aimed at discriminatory practices, which dispenses with any need to establish scienter. First, Congress may found such a remedial statute on its obligation to enforce the Thirteenth Amendment by eradicating all badges and incidents of slavery, including hiring practices which exclude minorities without materially advancing legitimate employment concerns. Johnson v. Railway Express Agency, 421 U.S. 454 (1975); see also, Runyon v. McCrary, 427 U.S. 160 (1976); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). Second, Congress may found such a remedial statute on its power to regulate interstate commerce. Griggs v. Duke

Power Co., 401 U.S. 424 (1971) (Title VII of the Civil Rights Act of 1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (Title II of the Civil Rights Act of 1964). Finally, Congress may look to §5 of the Fourteenth Amendment as a source of power to enact broad prophylactic legislation extending beyond the contours of strict §1 liability. Katzenbach v. Morgan, 384 U.S. 641 (1966); South Carolina v. Katzenbach, 383 U.S. 301 (1966); see also, Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). Accordingly, whether one views 42 U.S.C. §1981 as a statute enacted to enforce the Thirteenth Amendment, as a statute regulating interstate commerce, or as a statute to enforce the Fourteenth Amendment, Congress' power to concern itself with the disproportionate racial impact of a challenged practice is undisputed.

As this Court has repeatedly recognized, however, the Civil Rights Act of 1866, of which 42 U.S.C. §1981 is a part, was premised almost exclusively upon the Thirteenth Amendment. McDonald v. Santa Fe Transportation Co., 427 U.S. 273 (1976); Runyon v. McCrary, 427 U.S. 160 (1976); Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975); Tillman v. Wheaton-Haven Recreational Association, 410 U.S. 431 (1973); Sullivan v. Little Hunting Park, 396

U.S. 229 (1966); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). Section 2 of the Thirteenth Amendment, the Enabling Clause of that Amendment, "'clothed Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.'" Jones v. Alfred H. Mayer Co., 392 U.S. at 439 (emphasis in Jones) (citation omitted). Moreover, Congress was given "the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation." Jones v. Alfred H. Mayer Co., 392 U.S. at 440.

The 39th Congress did just that by enacting, over President Andrew Johnson's veto, the Civil Rights Act of 1866. In doing so, Congress exercised its "special competence" by making "findings with respect to the effects of identified past discrimination" and by exercising "its discretionary authority to take appropriate remedial measures." Regents of the University of California v. Bakke, 47 L.Ed.2d 779 n.41 (1978) (Powell, J.). The badges and incidents of slavery found by the 39th Congress were extensive. The legislation it enacted, the Civil Rights Act of 1866, was all-encompassing

with regard to racial discrimination.* Sweeping with the broadest possible brush, the 39th Congress focused not merely on the then-current badges and incidents of slavery but instead sought to legislate equality by outlawing all enumerated forms of racial discrimination.

1. The Language of 42 U.S.C. §1981 Compels the Conclusion that Proof of Scienter Is Not Required

Two aspects of the language chosen for §1981 evidence the absence of any scienter requirement. The first is the simple but significant fact that intent is nowhere mentioned as a prerequisite for a violation of Section 1981. The pertinent portion of Section 1981 provides: "All persons...shall have the same right...to make and enforce contracts...as is enjoyed by white citizens...." This Court has consistently declined to read qualifications or additional requirements into the 1866 Act, and instead has declared "'that if we are to give [the law] the sweep that its origins dictate we must accord it a sweep as broad as its language.'" Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437 (1968)

* 42 U.S.C. §1981 thus protects not only blacks but also other minorities and even whites from discrimination. McDonald v. Santa Fe Transportation Co., 427 U.S. 273 (1976).

(brackets in original), quoting United States v. Price, 383 U.S. 787, 801 (1966). Its broad language does not permit the courts "to carve... an exception" where there is none on its face. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437 (1968). It is for this reason that this Court has rejected attempts, such as those by defendants here, to alter the plain meaning of its broad language through "'ingenious analytical'" arguments, Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437 (1968), or through a stilted and "mechanical reading" of that language, McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 287 (1976). And it is for this reason that an intent requirement cannot be judicially grafted onto this facially clear statute which has no such requirement.

Second, the unqualified language of §1981 is less stringent than that of the comparable language of Title VII of the Civil Rights Act of 1964, which this Court has held not to require proof of intentional discrimination. Griggs v. Duke Power Co., 401 U.S. 424 (1971). In Title VII, §703(h), 42 U.S.C. §2000e-2(h), appears to exempt from prohibited discrimination the use of "any professionally developed ability test" that is not "designed, intended or used to discriminate because of race...." Additionally,

§706(g), 42 U.S.C. §2000e-5(g), appears to require as a prerequisite to any court ordered remedies that the employer "has intentionally engaged or is intentionally engaging in an unlawful employment practice." This language, however, does not require a Title VII plaintiff, in order to prove a violation of the statute and to obtain relief, to prove that a challenged test or other practice has been used with an intent to discriminate. For "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). See also, Dothard v. Rawlinson, 433 U.S. 321 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 407 (1975).

Section 1981 could not be more clear on its face: there is no intent requirement. And when compared with a statute such as Title VII which employs the words "intended" and "intentionally," but which does not trigger an intent requirement, the totally neutral language of §1981, which simply provides that "[a]ll persons...shall have the same right...to make and enforce contracts ...as is enjoyed by white citizens," cannot be construed to require such a showing.

2. The Legislative History of the Civil Rights Act of 1866 Reinforces the Absence of an Intent to Discriminate Requirement in 42 U.S.C. §1981

The lack of ambiguity in the sweeping language of §1981 obviates an examination of its legislative history. Any such examination, however, reveals that the radical 39th Congress intended its language to be as broad as possible.

Nowhere in the congressional debates leading to the enactment of the Civil Rights Act of 1866 is it hinted that a civil plaintiff seeking to enforce his rights under the Act must prove that the deprivation of his rights resulted from acts of intentional discrimination. Rather, the legislative history conclusively demonstrates that Congress intended to provide practical freedom by outlawing all forms of discrimination against blacks.

As is reviewed in some detail in Jones v. Alfred H. Mayer Co., 392 U.S. 409, 426-444 (1968), nullification of the Black Codes was an important but hardly the only objective of the 1866 Act. The Black Codes of course had to be outlawed. But Congress "also had before it an imposing body of evidence pointing to the mistreatment of Negroes." Jones v. Alfred H. Mayer Co., 392 U.S. at 427 (emphasis in original). This mis-

treatment too had to be outlawed.* Thus, rather than enacting any of the legislative proposals directed solely at the Black Codes, Congress waited for ratification of the Thirteenth Amendment and for Senator Trumbull's broader bill "to protect the freedman in his rights." Cong. Globe, 39th Cong., 1st Sess. at 43. Jones v. Alfred H. Mayer Co., 392 U.S. at 429-431.

Two weeks after ratification of the Thirteenth Amendment, Senator Trumbull, author of the bill which became the Civil Rights Act of 1866, introduced his bill. Cong. Globe, 39th Cong., 1st Sess. at 129. He described its objectives in sweeping terms. It was "intended" to give effect to the Thirteenth Amendment and to "secure for all persons within the United States practical freedom." Cong. Globe, 39th Cong., 1st Sess. at 474 (emphasis added). More expansively, Senator Trumbull sought to insure that practical freedom through a bill which

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* As is recounted in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), "one of the most comprehensive studies then before Congress...concluded that, even if anti-Negro legislation were 'repealed in all the States lately in rebellion,' equal treatment for the Negro would not yet be secured." 392 U.S. at 428 (footnote omitted), citing Report of Carl Schurz, S. Exec. Doc. No. 2, 39th Cong., 1st Sess. at 45.

would "break down all discrimination between black men and white men." Cong. Globe, 39th Cong., 1st Sess. at 599 (emphasis added).

The opponents of Senator Trumbull's bill did not quibble with its language. Rather, they attacked it frontally as providing too much equality. For example, Senator Cowan bitterly opposed the bill because it would eliminate differential treatment "which in any way creates distinctions between black men and white men in so far as their civil rights and immunities extend." Cong. Globe, 39th Cong., 1st Sess. at 603. A bill simply outlawing the Black Codes he might have supported. "But this is not a bill simply for the abolition of slave codes. This is a bill for the abolition of all laws which create distinctions between black men and white ones." Cong. Globe, 39th Cong., 1st Sess. at 603 (emphasis added). In fact, objected Senator Cowan, the bill sought to place blacks and whites "upon precisely the same footing." Cong. Globe, 39th Cong., 1st Sess. at 604 (emphasis added).

Less than a month after Senator Trumbull had introduced his bill, the Senate passed it. Cong. Globe, 39th Cong., 1st Sess. at 606-607. The Senate did so "fully aware of the breadth of the measure it had approved." Jones v. Alfred

H. Mayer Co., 392 U.S. at 433.

The House was no less aware of the intended breadth of this bill. Representative Thayer, a proponent of the bill, spoke of the necessity of effectuating the Thirteenth Amendment's promise of freedom. "It is to give to it practical effect and force.... The practical question now to be decided is whether they shall be in fact freemen." Cong. Globe, 39th Cong., 1st Sess. at 1151 (emphasis added). Representative Cook was equally emphatic. Being free meant the elimination of all barriers and headwinds. This bill thus was necessary, for otherwise any "combination of men in his neighborhood can prevent [a black person] from having any chance to support himself by his labor." Cong. Globe, 39th Cong., 1st Sess. at 1124.

Representatives Cook and Thayer, among other supporters of the bill, were acutely aware that not all forms of discrimination are direct or readily apparent. Some forms of discrimination may have only a discriminatory effect but are equally objectionable. As Representative Lawrence stated, "there are two ways in which a State may undertake to deprive citizens of these absolute, inherent, and inalienable rights: either by prohibitory laws, or by a failure to protect any one of them." Cong. Globe, 39th

Cong., 1st Sess. at 1833. Representative Cook expressed his concern about a similar but more onerous distinction. After making his observation that a number of whites could join together to deny a black person the opportunity to support himself, he commented on the probable further plight of the black person: "They can pass a law [neutral on its face] that a man not supporting himself by labor shall be deemed a vagrant and shall be sold.... Now, are these men free? If a man can be sold as a vagrant because he does not labor, without any inquiry as to whether he can or cannot procure labor, is he a freeman?" Cong. Globe, 39th Cong., 1st Sess. at 1124. Echoing the same concern, Representative Thayer asked rhetorically: "[I]f it is competent for the new-formed Legislatures of the rebel States to enact...laws which impair their ability to make contracts for labor in such a manner as virtually to deprive them of the power of making such contracts...then I demand to know of what practical value is the amendment abolishing slavery in the United States?" Cong. Globe, 39th Cong., 1st Sess. at 1151 (emphasis added).

The answer, of course, was in the bill pending before the House. That bill, according to Representative Cook, would require quite simply that there "be no discrimination" on

grounds of race or color. Cong. Globe, 39th Cong., 1st Sess. at 1124 (emphasis added). When the House passed the bill, it, like the Senate before it, "too believed that it was approving a comprehensive statute forbidding all racial discrimination affecting the basic civil rights enumerated in the Act." Jones v. Alfred H. Mayer Co., 392 U.S. at 435 (emphasis in original).

President Andrew Johnson, believing the bill to be as broad as its language, vetoed the legislation. In his words, the bill attempted to legislate "a perfect equality of the white and black races." Cong. Globe, 39th Cong., 1st Sess. at 1679. Within two weeks, and with virtually no debate, Congress overrode his veto. Cong. Globe, 39th Cong., 1st Sess. at 1809, 1861.

The legislative history of the Civil Rights Act of 1866 is entirely unambiguous. The 39th Congress, which was empowered to prohibit all forms of racial discrimination, whether racially motivated or not, sought to enact antidiscrimination legislation as broad as its §2 powers would allow. It undisputedly thought that it had accomplished that objective in its Civil Rights Act of 1866.

3. There Is No Contemporary Rationale for Imposing a Scienter Requirement on 42 U.S.C. §1981

Even if it were proper for this Court to amend §1981 by engrafting a scienter requirement, there is no contemporary rationale for imposing such a requirement here.

The primary purpose of a scienter concept has been to provide a barrier against the unfair imposition of retrospective legal sanctions upon an unsuspecting defendant. E.g., Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976). Since the plaintiffs herein seek solely prospective equitable relief and since the defendants were on clear notice that their employment practices raised serious issues of racial fairness, no necessity for a scienter requirement as a barrier to unfair retrospective legal sanctions exists in this case.

A secondary purpose of a scienter concept is to insure that governmental officials will not be over-deterred from performing legitimate functions by a fear of strict liability. E.g., Wood v. Strickland, 420 U.S. 308 (1975). Since the defendants herein are engaged in employment practices which perpetuate racial exclusion while failing to improve the quality of the workforce, no necessity for a scienter requirement as a

brake on over-deterrence of legitimate activity exists.

Given (a) the prospective equitable nature of the relief sought; (b) the defendants' knowledge of probable illegality; (c) the racially exclusionary nature of the practices at issue; and (d) the failure of the practices at issue to improve job performance, no substantial social policies would be served by imposing a scienter obligation on plaintiffs challenging racially exclusionary public employment practices under 42 U.S.C. §1981.

Moreover, viewed from the perspective of a minority applicant for employment, it matters not at all whether the irrational* hurdle which bars his path was constructed maliciously, recklessly, negligently or inadvertently, since the net result is identical--the exclusion of racial minorities from employment by means of tests or devices which screen out minorities without materially aiding in the establishment or maintenance of an effective civil service.

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* The employment practices which are the subject of this litigation are irrational because they screen out racial minorities without improving the quality of the work force. If the practices were rational, i.e., predictive of employment performance, no violation of §1981 can occur despite the practices' disproportionate racial impact.

Of course, where the issue is not the grant of prospective relief but rather the imposition of retrospective sanctions, the mental culpability of a defendant may assume greater importance. E.g., Wood v. Strickland, supra. However, where, as here, minority plaintiffs seek prospective relief against defendants who were on notice of the possible illegality of their actions and who cannot demonstrate that the practices at issue are predictive of job performance, the case for a scienter requirement is at its lowest ebb. See generally, SEC v. World Radio Mission, Inc., 544 F.2d 536 (1st Cir. 1976) [scienter not required for 10(b)(5) prospective injunction].

B. Assuming Arguendo that 42 U.S.C. §1981 Requires Proof of Scienter, Plaintiffs Have Overwhelmingly Established Scienter as a Matter of Law.

Even if the Court engrafts a scienter requirement onto 42 U.S.C. §1981, any requisite showing of scienter has been conclusively established by plaintiffs in this case. It must be emphasized that plaintiffs were "not requir[ed]...to prove that the challenged action rested solely on racially discriminatory purposes," but only "that a discriminatory purpose has been a motivating factor in the decision." Arlington Heights v. Metro. Housing Development Corp., 429 U.S. 252, 265-266 (1977) (emphasis added); see also, Washington v. Davis, 426 U.S. 229 (1976).

The trial court, however, believing the issue of scienter to be irrelevant under Section 1981, nevertheless made a gratuitous finding that defendants did not act with the "willful or conscious prupose" of excluding blacks and Chicanos from public employment. Finding of Fact Number 7 in 8 FEP Cases 239, 241 (1973). In making this finding, the trial court erred as a matter of law by not defining the culpable mental state applicable to defendants. The trial court also erred in placing the burden of

persuasion on the scienter issue on plaintiffs. This Court's decisions establish that once a plaintiff produces evidence which indicates that it is more probable than not that a defendant has acted with improper racially discriminatory purpose, the burden of producing evidence to rebut that prima facie showing as well as the burden of persuasion on the issue of scienter shifts to the defendant. To the extent that scienter is added by this Court to §1981, the trial court's errors on culpable mental state and burdens of proof, discussed hereafter in sections B.2. and B.3., must be reversed as a matter of law.

However, even assuming arguendo that plaintiffs were legally required to prove the highest state of mental culpability and that plaintiffs had not only the production burden but also the persuasion burden, plaintiffs' proof was sufficiently overwhelming for this Court to find the trial court's Finding of Fact Number 7 "clearly erroneous." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). As is set forth hereafter, plaintiffs unquestionably proved that a discriminatory purpose was a motivating factor in defendants' employment practices.

1. Plaintiffs Established a Racially Discriminatory Purpose as a Matter of Law.

As noted above, plaintiffs only were required to prove that a racially discriminatory purpose had been a motivating factor in defendants' hiring practices. As Justice Powell stated for the Court in Arlington Heights: "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." 429 U.S. at 266. Fruitful subjects for such circumstantial and direct evidence are not a matter of speculation, as Justice Powell, "without purporting to be exhaustive," specifically described a number of "subjects of proper inquiry in determining whether racially discriminatory intent existed." 429 U.S. at 266-268.

Three of the "subjects of proper inquiry" set forth in Arlington Heights are particularly relevant to defendants' conduct in this case:

(a) The discriminatory intent of defendants' hiring practices is "unexplainable on grounds other than race," 429 U.S. at 266;

(b) The "historical background" of defendants' hiring practices evidences defendants' discriminatory purpose, 429 U.S. at 267; and

(c) The defendants' "departures from the normal procedural sequence" further reveals defendants' "improper purposes." 429 U.S. at 267.

The evidence in the record is more than sufficient to resolve this inquiry in plaintiffs' favor as a matter of law.

a. The Racial Imbalance of Defendants' Workforce, and the Discriminatory Impact of the 1972 Written Test Are Unexplainable on Grounds Other than Race

In Washington v. Davis, 426 U.S. 229 (1976), this Court made clear that although statistics in some instances may not be enough to prove discriminatory purpose, the use of statistics showing racial imbalance or racial impact is "not irrelevant." 426 U.S. at 241. Rather, a "discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." 426 U.S. at 242. Far from irrelevant, racial statistics sometimes illuminate a "clear pattern" of discrimination, "unexplainable on grounds other than race." Arlington Heights v. Metro. Housing Development Corp., 429 U.S. 252, 266 (1977).

In the area of employment discrimination, workforce statistics are of primary importance in revealing improper discriminatory purpose. As this Court explained in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977):

> "Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." 431 U.S. at 339-340 n.20 (emphasis added).

In this case, the racial and ethnic composition of defendants' workforce is wholly unrepresentative of the racial and ethnic population of the community.* As the court of appeals below summarized:

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* Defendants have argued that population statistics are not the best statistics for comparative purposes. Defendants' argument is flawed for two reasons. First, the "argument fails in this case" even more resoundingly than it did in International Brotherhood of Teamsters v. United States, 431 U.S. 324, 339-340 n.20 (1977), because §1981, unlike Title VII, does not contain a statutory clause militating against workforce-population comparisons. Yet, even in Teamsters, this Court stated:

> "Evidence of long standing and gross disparity between the composition of a work force and that of the general population thus may be significant even though §703(j) makes clear that Title VII imposes no requirement that a work force mirror the general population." 431 U.S. 324, 339-340 n.20 (1977).

Second, use of population statistics for workforce comparability is as proper here as it was in Teamsters where the jobs at issue were entry-level jobs requiring no special qualifications. Cf., Hazelwood School District v. United States, 433 U.S. 299 (1977).

> "Despite a minority population of approximately 29.1% in Los Angeles County, only 3.3% of the firemen employed by the defendants at the time of trial were black or Mexican-American." 566 F.2d at 1337.

Stated otherwise, although approximately 10.8% of the general population of Los Angeles County is black, only 9 persons in defendants' workforce of 1,762, or .5%, were blacks. (R.136) And although 18.3% of the general population of Los Angeles County is Mexican-American, only 50 persons in defendants' workforce, or 2.8%, were Mexican-Americans. (R.136) In a county with a very sizeable and growing minority population, 96.7% of the defendants' jobs had been given to whites. This considerable racial imbalance is not merely a telltale sign of purposeful discrimination. It is entirely unexplainable on grounds other than race.

The second set of statistics of particular relevance is the racial impact of the challenged practice. "It is also not infrequently true that the discriminatory impact...may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds." Washington v. Davis, 426 U.S. 229, 242 (1976).

The discriminatory impact of the defendants'

1972 and 1969 written tests was considerable. As summarized by the court of appeals, in 1972, "while 25.8% of the white applicants were among the top 544 scorers on the test, only 5.1% of the black applicants were included in that group." 556 F.2d at 1337. The 1969 test results were equally startling. "Of the 244 blacks who took the 1969 examination, 5 were hired; of the 100 Mexican-Americans, 7 were hired, while of the 1080 whites taking the test, 175 were hired. Thus, while approximately 25% of the 1969 applicants were black or Mexican-American, based on the results of this test, only 6.4% of the hires were minorities." 556 F.2d at 1337. Coupled with the defendants' severely unbalanced workforce, defendants' use of written tests with such a racially disparate impact is difficult to explain on nonracial grounds.

b. The Historical Background of Defendants' Hiring Practices Also Reveals Discriminatory Purpose

Plaintiffs below did not rely solely on the foregoing statistics. They also provided evidence of the "historical background" of defendants' practices which "reveal[ed] a series of official actions taken for invidious purposes." Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. at 267.

Not only did defendants' written tests have a severe racially discriminatory impact, defendants knew that the tests were discriminatory and could not be shown to be job related. (Pl.Ex.8) As the evidence at trial revealed, high officials in defendants' personnel department knew that the written tests operated with a discriminatory impact to exclude blacks and Mexican-Americans from firefighter positions. (Pl.Exs.7,8,9; T.R. 48-49) Moreover, defendants "conceded that no studies establishing the validity of the written employment tests have been conducted in accordance with 'professionally acceptable methods.'" 566 F.2d at 1337 n.5. But despite these admissions, defendants knowingly and willfully continued to use their discriminatory tests until they learned that plaintiffs' lawsuit was about to be filed.

Defendants' use of this discriminatory written test was not the only selection criterion used to discriminate. Defendants also required applicants to meet a 5'7" height requirement. Aware that this requirement had a severely discriminatory impact, defendants "stipulated that 41% of the otherwise eligible Mexican-American applicants are excluded by the requirement." 556 F.2d at 1341 (footnote omitted). Again, defendants offered no validity studies. Instead, Fire Chief Stanley E. Barlow, who stood only

5'8" tall, "conceded that in the past firemen under 5'7" have been able to function without impairment dur to their height." 556 F.2d at 1342. Despite these admissions, and despite the clear illegality of their use of this discriminatory height requirement, Dothard v. Rawlinson, 433 U.S. 321 (1977), defendants knowingly and willfully continued their discriminatory practice.

Given this historical background, it is not surprising that the Los Angeles County Fire Department was known in the minority community as a racially discriminatory employer. (T.R. 52,134) Defendants, however, took no steps to dispel their apparently well-earned discriminatory reputation. (T.R. 194)

c. Defendants' Departure from Normal Procedures Further Proves Improper Discriminatory Purpose

Also probative of improper motives are "[d]epartures from the normal procedural sequence." Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. at 267. Proof here is not limited only to procedural departures. "Substantive departures too may be relevant." 429 U.S. at 267. Although evidence of procedural or substantive departures ordinarily is difficult to discover, three significant departures by defendants were proven here by plaintiffs.

Loss of 300 applications--Normally, an employer's discriminatory practices, especially a practice such as a discriminatory height requirement, will have an adverse impact on minority applicant flow "since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory." Cf., Dothard v. Rawlinson, 433 U.S. 321, 330 (1977). This undoubtedly was the situation here. Yet, minorities continued to apply. Apparently defendants were concerned that too many minorities had applied or sought to apply. At one stage, defendants inexplicably "lost" the names of 300 minorities who sought applications. (T.R.122-145, 188)

Discrimination in applicant assistance programs--In the normal course of events, defendants conducted programs designed to assist applicants to compete for employment. However, according to the testimony of Harold McCann, a captain in the Los Angeles County Fire Department, these programs were conducted exclusively for whites, while similar programs for minority participants were prohibited by the Fire Department. (T.R.91-113)

Sudden hiring of numerous minority applicants--The third and most telling departure

from past practices occurred after defendants learned that they were about to be sued by plaintiffs. Defendants' normal hiring practices had virtually excluded blacks and Mexican-Americans from employment. But, upon learning about the instant lawsuit, defendants backpedaled furiously. After this lawsuit was filed, defendants demonstrated the depth of their past discrimination by easily hiring minorities above their representation in the population. (R.140-141; T.R.48-49) Although defendants' efforts to redress the effects of their past discrimination are commendable, they underscore the discriminatory purposes which infected defendants' prior hiring practices.

Even if plaintiffs bear the burden of persuasion on the issue of scienter, the above-described facts conclusively establish that improper racially discriminatory purposes infected defendants' hiring practices. Although defendants testified that the exclusion of minorities from the Fire Department was not purposeful, the undisputed facts in the record make it impossible for a fact finder to determine that defendants' hiring practices were not in part motivated by racially discriminatory purposes. Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. at 265-266.

2. Plaintiffs Established a Sufficiently Culpable Mental State to Justify Liability and Prospective Relief.

Although Amici submit that plaintiffs here proved as a matter of law "that a discriminatory purpose has been a motivating factor" in defendants' use of discriminatory employment practices, Arlington Heights v. Metro. Housing Development Corp., 429 U.S. 252, 265-266 (1977) (emphasis added), plaintiffs need not have proved as much as they did.

In Arlington Heights and in Washington v. Davis, 426 U.S. 229 (1976), this Court ruled that some degree of mental culpability must be found to establish a violation of the Equal Protection Clause. However, in identifying a subjective mental condition as an element of a Fourteenth Amendment violation, this Court took merely the first step in the process of defining precisely the nature of the mental state which will trigger such a violation. The Court in Washington discussed only two possible mental states: malicious guilt and complete innocence. While such a bi-polar analysis may be helpful in deciding whether scienter is required at all to establish a constitutional violation, it is too simplistic to serve as a guide for determining

the precise mental state necessary to give rise to such a violation. Additionally, as we have pointed out in section A.3, supra, whatever the proper guide may be for constitutional liability, that guide is not necessarily appropriate for employment defendants under 42 U.S.C. §1981. Since §1981 has never had a scienter requirement imposed upon it, the nature of such a requirement remains an open question if in fact scienter is engrafted.

Since mental states do not neatly divide into the extremes of the bi-polar model, it is necessary to identify intermediate or equivalent mental states which encompass neither malicious guilt or complete innocence. Thus, in mapping the contours of the good faith defense available to government officials sued for retrospective damages, this Court has been careful to identify a mental state consistent with recklessness or negligence, and to predicate liability upon it. E.g., Wood v. Strickland, 420 U.S. 308 (1975). Similarly, courts in the wake of Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976), have explored whether a mental state consistent with negligence may form the basis for prospective equitable relief even when negligence alone has been found insufficient for an award of retrospective damages. E.g., SEC v. Universal Major Industries Corp.,

546 F.2d 1044 (2d Cir. 1976); SEC v. World Radio Mission, 544 F.2d 535 (1st Cir. 1976). Indeed, Ernst & Ernst v. Hochfelder, supra, itself reserved the question of whether a state of mind consistent with recklessness would give rise to a 10(b)(5) action for retrospective damages. 425 U.S. at 194 n.12. Similarly, the extent to which mental states consistent with recklessness and negligence provide sufficient culpability to warrant a conviction of varying degrees of homicide have been the subject of intense study. E.g., Perkins, The Criminal Law 61 (1957); Michael and Wechsler, A Rationale of the Law of Homicide, 37 Col.L.Rev. 701 (1937); Wechsler, Codification of the Criminal Law in the United States: The Model Penal Code, 68 Col.L.Rev. 1425 (1968).

Finally, the law of torts has systematically explored mental states lying on a continuum from willful intent to total inadvertence in an attempt to determine the requisite mental condition upon which to predicate liability. In fact, the negligence standards of tort liability in some instances have been adopted in whole as applicable to determining liability under 42 U.S.C. §1983. Thus, in Monroe v. Pape, 365 U.S. 167 (1961), the Court rejected a standard under 42 U.S.C. §1983 requiring proof of "the doing of an act with 'a specific intent to

deprive a person of a federal right,'" because the word "'willfully' does not appear in [§1983]" and because §1983 is not a "criminal law" but rather only "provides a civil remedy." 365 U.S. at 187. Accordingly, §1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." 365 U.S. at 187.*

Just as courts have been compelled to identify and determine the legal consequences of intermediate or equivalent mental states in areas of the law as divergent as tort liability, securities regulation, and homicide, so must this Court confront the forseeable consequences test and the intermediate or equivalent mental states such as recklessness, negligence, gross disregard

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* This forseeable consequences test has been widely applied in school desegregation cases. Most recently, Judge Wisdom, writing for the court in United States v. Texas Educational Agency, 564 F.2d 162 (5th Cir. 1977), held that "discriminatory intent may be inferred from...acts that had forseeable discriminatory consequences." 564 F.2d at 168; see generally, 564 F.2d at 165-170. For other applications of the forseeable consequences test, see, United States v. School District of Omaha, 521 F.2d 530, 535-536 (8th Cir.), cert. denied, 423 U.S. 946 (1975); Morgan v. Kerrigan, 509 F.2d 580, 588 (1st Cir. 1974), cert. denied, 421 U.S. 963 (1975); Oliver v. Michigan State Board of Education, 508 F.2d 178, 181-182 (6th Cir. 1974), cert. denied, 421 U.S. 963 (1975); Bradley v. Milliken, 484 F.2d 215, 222 (6th Cir. 1973), aff'd in relevant part, 418 U.S. 717, 738 n.18 (1974).

and deliberate indifference in the context of §1981, assuming this Court imposes a scienter requirement on §1981. Given the facts of this case, no reasonable finder of fact could fail to find that defendants, at best, not only foresaw the consequences of their acts but also acted with recklessness, deliberate indifference of, and gross disregard for the discriminatory effects of their non job related practices on racial minorities. Such a culpable mental state is more than sufficient to found prospective relief.

Amici submit that defendants' negligence in gratuitously inflicting harm on minority applicants should constitute a sufficiently culpable mental state to found prospective liability under §1981. Where, as here, defendants' culpability far exceeds negligence, constituting instead reckless disregard and deliberate indifference, the district court was authorized and, indeed, obligated to enter effective prospective relief disestablishing racially exclusionary hiring practices.

3. The District Court Erred in Allocating the Burden of Proof on the Issue of Scienter.

Amici have argued in Point A, supra, that the legislative history and Thirteenth Amendment ancestry of 42 U.S.C. §1981 render it extremely unlikely that Congress intended to burden freedmen seeking prospective relief against racially exclusionary employment practices with a scienter requirement. However, if this Court determines that the district court lacked power to issue prospective relief in the absence of some degree of mental culpability, this Court must begin the task of defining and allocating the burdens of proof* on the issue of scienter.** In criminal cases, the Due Process Clause governs the allocation and size of the persuasion burden, leaving to the courts substantial latitude in allocating the production burden. E.g., Davis v. United States, 160 U.S. 469 (1895) (production burden on insanity on defendant; persuasion

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* Amici use the term "burdens of proof" to include the burden of production and the burden of persuasion. See generally, J. Thayer, A Preliminary Treatise on Evidence at the Common Law, 355-59 (1898); James, Burdens of Proof, 49 Va.L.Rev. 51 (1961).

** Amici have discussed the precise nature of the culpable mental states necessary to establish a §1981 violation in sections B.1. and B.2., supra.

burden on prosecution). See generally, In re Winship, 397 U.S. 358 (1969); Mullaney v. Wilbur, 421 U.S. 624 (1975); Patterson v. New York, 432 U.S. 197 (1977). In many civil contexts, the legislature has directed a given allocation of the production and persuasion burdens. In most cases, however, the courts retain substantial latitude in choosing the size and allocation of both production and persuasion burdens. E.g., James, Burdens of Proof, 47 Va.L.Rev. 51 (1961); Cleary, Presuming and Pleading: An Essay on Juristic Immaturity, 12 Stan.L.Rev. 5 (1959). Although the court below did not explicitly allocate burdens of proof, it appeared to assume that both the production and persuasion burdens on the scienter issue rested with the plaintiffs. Such an assumption was erroneous.*

Modern analysis reveals that the allocation and size of the burdens of proof in a civil case are governed by two factors: (1) relative ease of access to the evidence; and (2) the degree of error displacement which the legal system wishes to impose on a given fact-finding process. See,

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* As Amici have shown in section B.1, supra, even under such an erroneous view of the burdens of proof, plaintiffs established discriminatory purpose as a matter of law.

e.g., Underwood, The Thumb on the Scale of Justice: Burdens of Persuasion in Criminal Cases, 86 Yale L.J. 1299 (1977); McBaine, Burden of Proof: Degrees of Belief, 32 Cal.L.Rev. 242 (1944). Whether one approaches the issue of proof of scienter in an employment discrimination case from the perspective of relative ease of access to the evidence or from the perspective of displacement of error, the burdens of proof should, in large part, be borne by the defendant.

First, as this Court noted in Arlington Heights v. Metro. Housing Development Corp., supra, proof of purposeful racial animus is a difficult task. The subjective motivation of actors in our legal system has consistently proven an elusive and baffling quarry. Cf., Screws v. United States, 325 U.S. 91 (1945). Moreover, the difficulty of establishing a state of mind is exacerbated when the particular mental state is morally repugnant. Put bluntly, subjective bigotry is uniquely difficult to prove precisely because bigots are not encouraged to advertise their true feelings and, indeed, may not even consciously recognize the racially tinged roots of their behavior. If, however, this Court directs the lower courts to embark upon a search for such an elusive subjective phenomenon, no doubt exists that defendants

enjoy far greater access to the relevant proof than do plaintiffs. Proof concerning the existence of neutral justifications for racially exclusionary employment practices will rarely, if ever, be available to a plaintiff, but will be routinely available to a defendant.

Second, it is, of course, a truism to note that to the extent our legal system errs in the area of racially unfair hiring practices, it should err on the side of their prospective disestablishment of unfair practices. Thus, if error is to be displaced, it should be displaced in favor of ending racially exclusionary hiring practices which do not materially contribute to the effeciency of the work force. Traditionally, our legal system has effected such a displacement of error by carefully allocating and defining the burden of persuasion. See generally, Underwood, The Thumb on the Scale of Justice, supra; Morse, Evidentiary Lexicology, 59 Dick.L.Rev. 86 (1954); cf., Patterson v. New York, 432 U.S. 197 (1977); Castaneda v. Partida, 430 U.S. 482 (1977); In re Winship, 397 U.S. 358 (1969).

Given the powerful arguments in favor of imposing both burdens of proof on the scienter issue on a §1981 defendant, it would be reasonable to require a §1981 defendant to bear both the production and persuasion burdens. However,

Amici believe that the purposes of §1981 may be served by the less dramatic allocation suggested by this Court in Castaneda v. Partida, 430 U.S. 482 (1977). Under such an allocation, §1981 plaintiffs would bear the production burden on the issue of scienter. Once such a production burden were satisfied, however, the persuasion burden would be borne by the defendant.*

a. The Nature of Plaintiffs' Production Burden

Orthodox evidentiary analysis defines a production burden as the obligation to produce evidence from which a reasonable finder of fact may determine that the contested fact (scienter) is more likely than not to exist.** Where, as

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* A similar judge-made bifurcation of the production and persuasion burdens exists in most jurisdictions with respect to the insanity defense. Criminal defendants bear a production burden on the issue of sanity. However, once such a production burden is met, the state bears the persuasion burden. E.g., Davis v. United States, 160 U.S. 469 (1895).

** Recent analysis has argued that the production burden is not a fixed quantum of evidence, but rather varies as a function of the persuasion burden. McNaughten, Burden of Production of Evidence: A Function of a Burden of Persuasion, 68 Harv.L.Rev. 1382 (1955). See United States v. Taylor, 464 F.2d 240 (2d Cir. 1972); United States v. Melillo, 275 F.Supp. 314 (E.D.N.Y. 1967). However correct such an approach may be as a matter of pure logic, Amici have described the production burden as a fixed concept, first, because substantial persuasion burden consequences turn on its satisfaction. Since the allocation of the persuasion burden to the defendant is triggered by satisfaction of the production burden, Amici deem it appropriate to adopt the concept of a fixed production burden. United States v. Feinberg, 140 F.2d 592 (2d Cir. 1944) (per Learned Hand).

here, plaintiffs have demonstrated, first, that defendants' employment practices acted to exclude blacks and Chicanos from the work force and, second, that the practices were not materially effective in establishing or maintaining an efficient work force, an inference of scienter may be drawn by a reasonable finder-of-fact. Washington v. Davis, 426 U.S. at 253 (Stevens, J., concurring opinion). See, United States v. Texas Educ. Agency, 564 F.2d 162, 165-170 (5th Cir. 1977) (defendants in a school desegregation case are presumed to intend the natural consequences of their acts), citing Monroe v. Pape, supra. Accordingly, plaintiffs have clearly satisfied their production burden.* Castaneda v. Partida, 430 U.S. 482 (1977).

b. The Nature of the Defendants' Persuasion Burden

The persuasion burden instructs the finder of fact as to the proper disposition of doubtful cases. Where, as here, a plaintiff seeking prospective relief has come forward with evidence from which a reasonable finder of fact may infer purposeful racial discrimination, doubts should be resolved in favor of the plaintiff. Such a

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* Not only have plaintiffs satisfied a production burden, they have produced sufficient evidence of racially discriminatory purpose to satisfy a persuasion burden as well. See, section B.1., supra.

resolution maximizes the prospective disestablishment of racially unfair practices, without saddling a defendant with retrospective liability. Thus, Amici suggest, a finder-of-fact should be instructed to find for a plaintiff in a §1981 action seeking prospective relief unless the defendants persuade the finder of fact that it is more likely than not that scienter did not exist.*

c. Castaneda v. Partida is an Example of the Proper Allocation of Burdens of Proof

In Castaneda v. Partida, supra, a habeas corpus petitioner challenged the constitutionality of the Grand Jury selection process in Hildago County, Texas, alleging that Mexican-Americans were substantially underrepresented on the panels. As the decisions of this Court made clear, in order to prevail, the petitioner was obliged to demonstrate the intentional exclusion of racial minorities from the Grand Jury process. Thus, the issue of scienter was squarely posed.

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* As noted in section B.1., infra, defendants' evidence is inadequate to meet the slightest of burdens of persuasion and, in fact, is wholly insufficient to rebut plaintiffs' showing of purposeful discrimination, even if plaintiffs are found to have the burden of persuasion on the issue of scienter.

In support of his contention, the petitioner in Castaneda produced statistical evidence demonstrating that while Hidalgo County was 79 percent Mexican-American, minority representation on Grand Jury panels approximated only 40 percent. This Court found that such evidence of disproportionate racial impact satisfied petitioners' production burden on the issue of scienter.

Respondents in Castaneda produced virtually no evidence tending to rebut the inference of scienter which flowed from petitioner's statistics. Under such circumstances, this Court reversed a finding of fact by the trial court that scienter did not exist. Although this Court did not explicitly describe its allocation of the persuasion burden in Castaneda, its action in reversing the district court's finding of fact reveals that the persuasion burden was allocated to the respondent. If the persuasion burden were deemed to rest with petitioner in Castaneda, this court's reversal could be explained only by a finding that, based on petitioner's statistics, no reasonable finder of fact could fail to find that it was more probable than not that scienter existed. While such a reading of Castaneda is possible, it is a highly strained one. If, however, the persuasion burden is deemed to rest with the respondents in Castaneda,

this Court's reversal is explained by a finding that, given respondents' total failure to present rebuttal evidence, no reasonable finder of fact could find that it was more probable than not that scienter did not exist.

d. Defendants Failed, as a Matter of Law, To Satisfy a Persuasion Burden on the Issue of Scienter

Under an appropriately allocated persuasion burden, defendants must establish that it is more likely than not that no culpable mental state existed. Unlike the defendants in Washington v. Davis, supra, the defendants herein have come forward with no evidence tending to negate the existence of a culpable mental state. 426 U.S. at 235, 246.

In Washington, the defendants first countered the discriminatory effect of their test by proving that it was "directly related to the requirement of the police training program and that [there was] a positive relationship between the test and training course performance." 426 U.S. at 250. More importantly, however, the Washington defendants had for years "systematically and affirmatively sought to enroll black officers." 426 U.S. at 235. These efforts had produced a 44% black work force, a workforce representation which was "roughly

equivalent" to black population in defendants' recruitment area. 426 U.S. at 235. These efforts also produced years of new recruit classes which also were 44% black. 426 U.S. at 235.

The record in the instant case could not be more dissimilar from that in Washington. First, defendants here "conceded that no studies establishing the validity of the written employment tests have been conducted in accordance with 'professionally acceptable methods.'" 566 F.2d at 1337 n.5. Since there were no studies correlating the test's relationship with job performance or with training performance, the court of appeals below quite properly noted that "defendants' proof not only is insufficient under Griggs, but also falls far short of the quality and quantity of proof offered in Washington." 566 F.2d at 1341 n.13. Moreover, defendants here had not undertaken systematic affirmative efforts to enroll minority firefighters, as was the case in Washington, 426 U.S. at 235. Instead, their discriminatory practices resulted in only a trickle of black and Mexican-American employees, and produced a workforce of only 3.3% black and Mexican-American firefighters at the time of trial. 566 F.2d at 1337.

The absence of any good faith efforts by defendants here is further illustrated by the historical background of defendants' practices (including their knowing use of their discriminatory and unvalidated written test, and their knowing use of their discriminatory and unvalidated 5'7" height requirement), as well as by their departures from normal procedures (including their loss of the names of 300 minority applicants and their prohibition against conducting application programs which included minority applicants while conducting such programs for whites). While a smoking gun, of course, is unnecessary, plaintiffs' evidence at trial was so strong that Fire Chief Barlow himself admitted that defendants had engaged in intentional discrimination. (R.T.187-188)

The evidence of purposeful discrimination is so strong in this case that plaintiffs' proof is sufficient to carry a burden of persuasion on the issue of scienter. Given the allocation of the burden of persuasion suggested by Amici and by this Court's decision in Castaneda, however, it seems beyond question that no reasonable finder of fact on this record could find that the requisite scienter did not exist.

Accordingly, Amici urge this Court to follow its practice in Castaneda and to reverse the

district court's Finding of Fact on the scienter issue. At a minimum, however, the issue should be remanded for fresh findings of fact under an appropriately allocated burden of persuasion and with guidance as to the mental states under which prospective relief can be granted under §1981.

C. The Affirmative Hiring Order Imposed To Remedy Defendants' Past Discrimination Is Constitutionally Permissible If Not Constitutionally Required

More than a decade ago, speaking of the remedial powers of the federal courts, this Court stated that a "court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." Louisiana v. United States, 380 U.S. 145, 154 (1965) (emphasis added). Where past discrimination is found, a district court's "task is to correct, by a balancing of the individual and collective interests, the condition that offends" the law. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16 (1971) (emphasis added).

Nowhere have these maxims, requiring affirmative relief to overcome the effects of past discrimination, been more applicable and more widely applied than in employment discrimination litigation. See, e.g., Franks v. Bowman Transportation Co., 424 U.S. 747 (1976). In innumerable instances, the affirmative relief required or approved by the federal courts has encompassed numerical hiring ratios and goals to overcome the effects of past discrimination. See, e.g., Bridgeport Guardians v. Bridgeport Civil Service Commission, 482 F.2d 1333 (2d Cir.

1973) (where the affirmative relief imposed under 42 U.S.C. §1981 and §1983 established an ultimate goal, required future minority applicants to be placed in a separate minority pool, required 50% of the next ten vacancies to be filled from the minority pool, required 75% of the next twenty vacancies to be filled from the minority pool, and required 50% of the vacancies thereafter to be filled from the minority pool until the goal was reached), and Carter v. Gallagher, 452 F.2d 327 (8th Cir.) (en banc), cert. denied, 406 U.S. 950 (1972) (where the affirmative relief imposed under §1981 established a goal and required 33% of the future hires to be minority until the goal was attained), both of which were cited with approval by Mr. Justice Powell in his separate opinion in Regents of the University of California v. Bakke, 57 L.Ed.2d 750, 778 (1978) (Powell, J.). See also, the cases cited by Mr. Justice Brennan, writing for himself and for Justices White, Marshall, and Blackmun, 57 L.Ed.2d at 811 n.28 (Brennan, J.).*

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* The courts of appeals in nine circuits have ordered or approved race conscious numerical measures to remedy past discrimination or minority underutilization in employment.
FIRST CIRCUIT: Associated General Contractors of Mass., Inc. v. Altschuler, 490 F.2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974); Boston Chapter, NAACP, Inc. v. Beecher, 504 F.2d 1017 (1st Cir. 1974), cert. denied,

The judicial imposition of ratios and goals in order to remedy past discrimination was specifically approved by five members of this Court in Regents of the University of California v. Bakke, supra. In Bakke, Mr. Justice Powell unequivocally affirmed that after findings of discrimination have been made, "the governmental interest in preferring members of the injured groups at the expense of others is substantial." 57 L.Ed.2d at 782 (Powell, J.). He continued:

> "In such a case, the extent of the injury and the consequent remedy will have been judicially...defined. Also, the remedial action usually remains subject to continuing oversight to assure that it will work the least

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421 U.S. 910 (1975);
SECOND CIRCUIT: Rios v. Enterprise Association Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974); Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission, 482 F.2d 1333 (2d Cir. 1973); United States v. Wood Lathers Local 46, 471 F.2d 408 (2d Cir.), cert. denied, 412 U.S. 939 (1973);
THIRD CIRCUIT: Erie Human Relations Commission v. Tullio, 493 F.2d 371 (3d Cir. 1974); Contractors Association v. Secretary of Labor, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971);
FOURTH CIRCUIT: Sherrill v. J.P. Stevens & Co., 551 F.2d 308 (4th Cir. 1977);
FIFTH CIRCUIT: NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974); Morrow v. Crisler, 491 F.2d 1053 (5th Cir. 1974) (en banc), cert. denied, 419 U.S. 895 (1974); Local 53, Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969);
SIXTH CIRCUIT: EEOC v. Detroit Edison Co., 515 F.2d 301, 317 (6th Cir. 1975), vac'd and rem'd on other grounds, 431 U.S. 951 (1977); United States v. Masonry Contractors Association, 497 F.2d 871, 877 (6th Cir. 1974); United

possible harm to other innocent persons competing for the benefit." 57 L.Ed.2d at 782 (Powell, J.).

Mr. Justice Powell also, of course, cited with approval not only Bridgeport and Carter, where judicially imposed numerical ratios and goals had been premised upon findings of past discrimination, but also cases such as Contractors Association of Eastern Pa. v. Secretary of Labor, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971), and Associated General Contractors of Massachusetts, Inc. v. Altschuler, 490 F.2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974), where administratively imposed numerical ratios and goals had been premised not upon findings of past discrimination but only upon

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States v. Local 212, IBEW, 472 F.2d 634, 636 (6th Cir. 1973); Sims v. Local 65, Sheet Metal Workers, 489 F.2d 1023, 1037 (6th Cir. 1973); United States v. Local 38, IBEW, 428 F.2d 144, 149 (6th Cir.), cert. denied, 400 U.S. 943 (1970);
SEVENTH CIRCUIT: United States v. Chicago, 549 F.2d 415 (7th Cir. 1977), cert. denied, 434 U.S. 875 (1978); Crockett v. Green, 534 F.2d 715 (7th Cir. 1976); Southern Illinois Builders Association v. Ogilvie, 471 F.2d 680 (7th Cir. 1972);
EIGHTH CIRCUIT: United States v. N.L. Industries, Inc., 479 F.2d 354 (8th Cir. 1973); Carter v. Gallagher, 452 F.2d 327 (8th Cir.) (en banc), cert. denied, 406 U.S. 950 (1972);
NINTH CIRCUIT: United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 984 (1971).

determinations of minority underutilization. 57 L.Ed.2d at 778 (Powell, J.).*

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* To be sure, there has been extensive past discrimination in the building trades. But the constitutionality of executive order affirmative action requirements has been premised not upon findings of past discrimination but rather upon determinations of minority underrepresentation. In Contractors Association of Eastern Pa. v. Secretary of Labor, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971), the court held that statistical evidence "revealing the percentages of utilization of minority group tradesmen in the six trades compared with the availability of such tradesmen in the five-county area, justified the issuance of the order without regard to a finding as to the cause of the situation.... A finding as to the historical reason for the exclusion of available tradesmen from the labor pool is not essential for federal contractual remedial action." 442 F.2d at 177. A similar decision was reached in Associated General Contractors of Massachusetts, Inc. v. Altschuler, 490 F.2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974), where the court upheld the constitutionality of a numerical hiring order which had been imposed under a state executive order designed not to remedy past discrimination but only to redress minority underrepresentation. 490 F.2d at 13, 14, & 19. Gratuitously, if not as an afterthought, the court of appeals observed "that past racial discrimination in Boston's contruction trades is in large part responsible for the present racial imbalance." 490 F.2d at 21.

Similar decisions have upheld the constitutionality of the 10% set aside for minority business enterprises in §103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. §6705(f)(2), despite the fact that the 10% set aside was premised not on findings of past discrimination but only upon statistical evidence of minority enterprise underrepresentation. For example, in the first post-Bakke decision on the 10% set aside, the Court of Appeals for the Second Circuit upheld the 10% set aside as constitutional while observing that "the absence of such a finding

Mr. Justice Brennan, writing for himself and for Justices White, Marshall and Blackmun, presented an even more expansive view of the constitutional appropriateness of race conscious preferential remedies. In his view, not only may such remedies be imposed on government employers by the courts but governments voluntarily "may adopt race conscious programs designed to overcome substantial, chronic minority underrepresentation where there is reason to believe that the evil addressed is a product of past racial discrimination." 57 L.Ed.2d at 819 (footnote omitted) (Brennan, J.). The past discrimination being remedied need not be that of a specifically identified employer; rather, the past discrimination may be "its own or that of society's at large." 57 L.Ed.2d at 820-821 (Brennan, J.).

Where the past discrimination being remedied is not that of society at large but rather that of a specific employer judicially determined to have engaged in discriminatory practices, judicially imposed numerical relief is not only constitutionally permissible but also equitably necessary. As the Fifth Circuit recently observed, in a post-Bakke decision approving its pre-Bakke

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[of past discrimination] in the [legislative history] is not determinative. Fullilove v. Kreps, ___ F.2d ___, ___ (2d Cir., Sept. 22, 1978) (No. 78-6011, Slip Op. at 4830).

imposition of numerical hiring relief: "The Bakke decision should not be viewed as a contrary decision of law applicable to the issue of the constitutionality of affirmative hiring relief, but as a decision reaffirming the equitable power of federal courts to remedy the effects of unconstitutional acts through race-conscious means." Morrow v. Dillard, ___ F.2d ___, ___, 47 U.S.L.W. 2233, 2234 (5th Cir., Sept. 29, 1978) (approving affirmative relief which required the employer to offer appointment first to every black applicant who met the minimal qualifications necessary for employment).

The judicially imposed numerical relief at issue in the instant case, of course, was not intended to remedy the past discrimination of society at large. Rather, the community-representation goal and the 1:1:3 hiring ratio (1 black and 1 Mexican-American to be hired for every three whites hired)* were imposed to remedy the government employer's own longstanding

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* There of course is no issue in this case about whether affirmative relief should extend to unqualified members of the victimized group. The court of appeals below emphasized that "while it should be obvious to all, we nevertheless repeat the admonition that nothing said by this Court is to be taken as a requirement that the defendants hire any unqualified applicant for the performance of these essential jobs." 566 F.2d at 1344.

discrimination. In view of defendants' past practices, this affirmative relief may be inadequate. It certainly is less far reaching than the hiring relief approved in Morrow v. Dillard, supra; in Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission, supra; and even in International Brotherhood of Teamsters v. United States, 431 U.S. 324, 330 n.4 (1977).*

Regardless, the less far reaching affirmative relief imposed here is fully consistent with the forms of affirmative relief approved by a majority of this Court in Bakke. Given defendants' past practices resulting in the employment of a workforce which was only 3.3% minority in a community which was 29.1% minority several years before trial and which shortly will be 40% minority, "there is a sound basis for concluding that minority underrepresentation is substantial and chronic," 57 L.Ed.2d at 816 (Brennan, J.), and "there are no practical

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* In Teamsters, this Court addressed the difficult issue of applying remedies to current employees bound by seniority agreements. Not disturbed was the relatively simple 1:1 hiring formula for new employees. Under that formula, "the company obligated itself to hire one Negro or Spanish-surnamed person for every white person hired at any terminal until the percentage of minority workers at that terminal equaled the percentage of minority group members in the population of the metropolitan area surrounding the terminal." International Brotherhood of Teamsters v. United States, 431 U.S. 324, 330 n.4 (1977).

means by which [defendants] could [overcome the effects of their past practices] in the forseeable future without the use of race-conscious measures," 57 L.Ed.2d at 825 (Brennan, J.).* And, given the judicial findings of past discrimination, the numerical remedy "preferring members of the injured groups at the expense of others" is entirely appropriate "since the legal rights of the victims must be vindicated." 57 L.Ed.2d at 782 (Powell, J.).

The fact that the 1:1:3 hiring ratio was imposed only after due consideration by a federal court gives even greater constitutional credence to the appropriateness of the remedy. The federal courts, in the cases before them, unquestionably have "the authority and capability to establish, in the record, that the classification is responsive to identified discrimination." 57 L.Ed.2d at 783 (Powell, J.). Especially given their duty to remedy past discrimination, Louisiana v. United States, supra, they are unparalleled as jurisdictionally "competent to make those decisions." 57 L.Ed.2d at 783 (Powell, J.).

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* The near total exclusion of minorities from the defendants' workforce compels this conclusion. As the court of appeals below observed, "an accelerated hiring order is the only way 'to overcome the presently existing effects of past discrimination within a reasonable period of time.'" 566 F.2d at 1344 (emphasis added).

"Also, the remedial action...remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit." 57 L.Ed.2d at 782 (Powell, J.). As Mr. Justice Brennan observed, "claims of rival groups, although they may create thorny political problems, create relatively simple problems for the courts." 57 L.Ed.2d at 815, n.35 (Brennan, J.).

In view of defendants' historically exclusionary practices, the court-imposed affirmative remedy not only is constitutionally permissible but is equitably necessary.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

Dated: New York, New York
November 1, 1978

Respectfully submitted,

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